Filed 5/10/19 P. v. Michael D. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL D., Defendant and Appellant.	B285477 (Los Angeles County Super. Ct. No. BA450492)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Susan L. Ferguson for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Michael D. (hereinafter Michael)[1] of continuous sexual abuse of a child, committing a lewd act upon a child, and misdemeanor child molestation. Michael contends the trial court prejudicially erred by admitting hearsay evidence; his trial counsel provided ineffective assistance by failing to object to the evidence or request a limiting instruction; and the cumulative effect of the purported errors requires reversal. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

(i) *Michael's molestation of his daughter*

Michael had little contact with his daughter ("Daughter") until she was nine years old. At that point, Daughter and her older brother ("Brother") began spending one weekend a month with Michael at a home Michael shared with his mother and stepfather ("Grandmother" and "Grandfather"). Daughter's mother ("Mother") agreed to the visits because Grandmother wanted to spend more time with the grandchildren. While visiting, Daughter and Brother slept on couches in a small room used as a den.

In the summer of 2013, Michael, Grandmother, Grandfather, Brother, and Daughter visited Arizona on a vacation lasting approximately two weeks. Daughter and Michael shared a bedroom, Brother slept on the couch, and the grandparents slept in another bedroom. Daughter turned 12

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[1] To protect the victims, we omit appellant's last name and, with no disrespect, refer to him by his first name.

years old while they were in Arizona. One night prior to her 12th birthday, Michael got in bed with Daughter and massaged her chest and breasts under her clothing. He told her not to tell anyone. Confused and afraid, she did not report the incident.

When the family returned from vacation, Michael's abuse intensified. From 2013 until early 2016, Michael repeatedly molested Daughter in the middle of the night in the den where she was sleeping, including kissing her mouth, touching, massaging, and licking her breasts, touching her vagina, and digitally penetrating her vagina. On three occasions after Daughter turned 13, Michael attempted intercourse with her, touching and partially penetrating her vagina with his penis. The digital penetration and attempted intercourse were painful for Daughter and caused bleeding. On occasion, Michael masturbated and ejaculated while molesting Daughter. Although Brother was in the room asleep when the molestations occurred, he did not wake up during the incidents. Daughter did not report the abuse to anyone.

In early 2016, when Daughter was 14 years old, she "grew enough courage" to confront Michael and demand that the molestation stop. She told him his conduct was wrong and hurt her "because it's not the way a father-daughter relationship was supposed to be." Thereafter, Michael ceased molesting her.

(ii) *Michael's molestation of Daughter's cousin*

In May 2016, Daughter's 16 or 17 year old female cousin ("Cousin"), came to live with Daughter, Mother, and Brother. In June 2016, Cousin spent the weekend with Daughter and Brother at Michael's house. On June 8, 2016, the grandparents, Cousin, and Daughter visited the Science Center museum. Cousin spent approximately 30—45 minutes on her cellular

telephone, in violation of Michael's rule that cell phone use was prohibited during "family time." Michael, who did not attend the outing, was very angry when he learned about the cell phone use. He had Cousin wash the dishes that night as punishment. Cousin testified that she was not upset about the discipline.

That night, Daughter and Cousin slept on the couches in the den. In the early hours of the morning, Michael began massaging Cousin's head. Cousin pretended to be asleep. Michael rubbed her shoulders and back, making grunting noises. He then put his hand down her sweatpants and touched near her buttocks; he also squeezed her breast. Cousin kicked Daughter's hand to wake her up. Michael asked Cousin what was wrong, and she said she was fine; she did not want him to think she had been awake the "whole time." Michael left the room. Scared and "shellshocked," Cousin texted Daughter.

Daughter was awakened by Cousin kicking her hand. Daughter saw Michael, who was sitting next to Cousin, get up and leave the room. Cousin looked distressed. Daughter checked her cellular telephone and found numerous text messages from Cousin. In a text conversation between the girls,[2] Cousin said Michael put his hand in her pants and touched "it," so she tried to wake Daughter. She asked that Daughter come lie down by her. Daughter told Cousin that she should tell Michael to stop. Cousin said she did not wish to do so. Daughter said, " 'That's the way I got out of my situation.' " Daughter offered to talk to Michael on Cousin's behalf. She explained, " 'Four or five months ago the same stuff, that happened to me and I didn't have anyone

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[2] The girls conducted their discussion via text messages so Michael would not hear.

to protect me from it. It was worse because . . . it was happening every night I came over here. It came to a time I cried at home because I didn't want to come over there. This started three years ago. Then I finally didn't take his crap anymore and I told him, I said, "if you don't stop, I'm not going to come and see you anymore." And he told me not to tell anyone and I ignored him and it worked.' " Daughter stated that she had been emotionally upset by the abuse for years, and " 'every time I would see him I would want to stab him and cry after.' " Cousin responded that she did not wish Daughter to talk to Michael on her behalf. Daughter asked Cousin not to tell anyone about what she had disclosed. Without objection, screen shots of the text messages were admitted into evidence.

(iii) *The victims' disclosures to others*

Cousin began calling and texting her older sister, B., at 3:00 a.m. that morning. B., who had been asleep, did not notice the missed calls and texts until approximately 5:30 a.m. Cousin's texts said, " 'Emergency' " and " '[Daughter's] dad touched me.' " Upon reading the text messages, B. called Cousin, who stated that Michael had touched her. B. and her husband immediately drove to Michael's residence to pick Cousin up. When B. arrived, Cousin looked frightened and said, " 'Let me get out of here.' " Cousin said "it started off" with her and Michael joking about her needing a back massage.

B. confronted Michael. He initially said he gave Cousin a massage while she was awake. When B. questioned why he would give a massage to a minor in the middle of the night, he said "they were asleep" and he decided to give Cousin a massage while she was sleeping. When B. spoke further to Cousin, Cousin

stated that "[Daughter] has been going through the same thing." B.'s husband called the police.

Officer Brent Evans responded to the call. Cousin, who appeared "shocked" and reluctant to talk, told him that at approximately 3:00 a.m. she awoke to find Michael rubbing her head. He then rubbed and squeezed her buttocks under her clothing. Cousin texted Daughter about what happened. Evans then interviewed Daughter, who was crying and appeared to be "very upset." Daughter stated that starting two years previously, Michael would grab her breasts and digitally penetrate her vagina, while she was on the couch. She said she would tell him to stop but he would not do so unless she told him more than once. Evans did not elicit further details from Daughter.

Daughter told Mother about Michael's actions that morning, revealing that he "did molest her" and had touched her vaginal area. Daughter was distraught and crying. Subsequently Daughter informed Mother of more details.

Daughter was examined at a rape treatment center on January 10, 2017; she later returned for a second, supplemental examination. Her medical records indicated that during the first examination, she reported to a nurse practitioner that Michael licked and rubbed her breasts, touched her genitals, and penetrated her vagina digitally and with his penis, causing pain and bleeding, and his body weight held her down. He also ejaculated on a towel. Nurse Sally Wilson, a supervising family nurse practitioner, conducted the supplemental examination. Daughter informed Wilson that penile vaginal penetration had occurred on multiple occasions, and she experienced pain and bleeding. The examinations revealed a healed laceration on

Daughter's hymenal tissue. Wilson concluded that sexual abuse was highly suspected.

(iv) *CSAAS expert testimony*

Dr. Susan Hardie, a registered nurse and psychologist, testified for the People as an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS). Among other things, Hardie explained that often, children do not call out for help during an episode of sexual abuse. It is not unusual for a child to appear happy in the perpetrator's presence when the abuse is not occurring. It is also not unusual for a youthful victim to fail to disclose, or delay disclosing, sexual abuse.

b. *Defense evidence*

The defense theory was that Cousin, who was a "wild child," fabricated the abuse and convinced Daughter to "concoct a plan of revenge" because Michael had disciplined Cousin for using her cellular telephone.

Grandfather testified that during the children's monthly visits, Michael and Brother played video games in the den almost every night, often until the early hours of the morning or all night. Michael was rarely alone in the den with Daughter. The room where Daughter and Brother slept was small, approximately ten feet by ten feet. Michael had established a "house rule" that the children could not use their cell phones during "family time." Michael ordered Cousin to wash the dishes to punish her for excessive cell phone use at the Science Center. Cousin crossed her arms and clenched her jaw in response.

Grandmother testified that Daughter, Brother, and Michael routinely played video games together. Daughter usually went to sleep early, while Michael and Brother continued playing "all night long." Grandmother would check on the

children during the night. The den wall abutted the grandparents' bedroom wall, and the walls were "paper thin." Cousin came with Daughter on two of the weekend visits in the summer of 2016. She was two years older than Daughter and more mature. Daughter led a sheltered life, but Cousin led "more of an adventurous life." Daughter looked up to Cousin. Cousin was "into her makeup." Cousin once accused Grandmother of taking her eyebrow pencil. Cousin also became upset when she could not find a teddy bear that she slept with, and "kind of" accused the family of taking it. Cousin had used her cell phone "a great deal" while at the Science Center.

2. *Procedure*

A jury convicted Michael of continuous sexual abuse of Daughter between August 1, 2013 and July 29, 2015 (Pen. Code, § 288.5, subd. (a));[3] five counts of committing a lewd act upon a child, Daughter (§ 288, subd. (c)(1)); and one count of misdemeanor child molestation of Cousin (§ 647.6, subd. (a)(1)). After denying Michael's motion for a new trial, the trial court sentenced him to 14 years in prison. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, a criminal conviction assessment, and a sexual offender program fund fine. Michael timely appealed.

DISCUSSION

Michael's contentions have been forfeited, and he has not established ineffective assistance of counsel

Michael argues that the trial court prejudicially erred by admitting screen shots of, and testimony about, the text

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[3] All further undesignated statutory references are to the Penal Code.

messages between Daughter and Cousin, as well as the testimony of Officer Evans, Mother, Cousin, B., and the nurse practitioner relating Daughter's statements. He contends this evidence did not fall within the "fresh complaint" doctrine or any recognized hearsay exception. Admission of the evidence, he insists, violated his federal due process rights. He also argues that, once the testimony was admitted, the jury should have been given a limiting instruction, and his counsel provided ineffective assistance by failing to object or request a limiting instruction.

The People contend that Michael has forfeited his claims. They urge that, in any event, the bulk of the challenged evidence was admissible under the "fresh complaint" doctrine and as the basis for the nurse practitioner's testimony,[4] and any evidence erroneously admitted amounted to harmless error.

1. *Forfeiture*

The defense did not object to any of the testimony now challenged on appeal, nor did defense counsel request a limiting instruction. Michael's contentions have therefore been forfeited. (Evid. Code, § 353, subd. (a) [judgment will not be reversed on the ground of erroneous admission of evidence unless defendant made a timely and specific objection]; *People v. Clark* (2016) 63 Cal.4th 522, 574; *People v. Stevens* (2015) 62 Cal.4th 325, 333 [failure to object to hearsay evidence at trial forfeits appellate claim that such evidence was improperly admitted]; *People v. Streeter* (2012) 54 Cal.4th 205, 236 [failure to raise federal constitutional objection in trial court forfeits appellate claim];

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[4] The People do not argue that the evidence was admissible under the prior consistent statement exception to the hearsay rule, and therefore we do not address this theory of admissibility.

People v. Brown (1994) 8 Cal.4th 746, 757 (*Brown*); *People v. Sanchez* (2016) 63 Cal.4th 411, 460 [trial court has no sua sponte duty to give a limiting instruction; argument not cognizable on appeal where defendant did not request instruction]; *People v. Manning* (2008) 165 Cal.App.4th 870, 880.)

2. *Michael has failed to establish ineffective assistance*

"The test for ineffective assistance of counsel is a demanding one." (*People v. Acosta* (2018) 28 Cal.App.5th 701, 706.) To establish ineffective assistance, a defendant has the burden to show his counsel's performance was deficient, and that he or she suffered prejudice as a result. (*People v. Mikel* (2016) 2 Cal.5th 181, 198; *Strickland v. Washington* (1984) 466 U.S. 668, 687—688; *People v. Acosta*, at p. 706.) If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

a. *Michael has not established that counsel's performance fell below an objectively reasonable standard*

Michael has failed to establish the first prong of his ineffective assistance claim, i.e., deficient performance, because much of the evidence was admissible, and he has not shown the absence of a tactical basis for counsel's alleged errors.

Hearsay is an out-of-court statement offered for the truth of its content, and is inadmissible unless each level of hearsay falls under an exception to the hearsay rule. (*People v. Sanchez* (2016) 63 Cal.4th 665, 674—675; Evid. Code, § 1200.)

Under the "fresh complaint" doctrine, "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the

circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred. Under such generally applicable evidentiary rules, the timing of a complaint (e.g., whether it was made promptly after the incident or, rather, at a later date) and the circumstances under which it was made (e.g., whether it was volunteered spontaneously or, instead, was made only in response to the inquiry of another person) are not necessarily determinative of the admissibility of evidence of the complaint. Thus, the 'freshness' of a complaint, and the 'volunteered' nature of the complaint, should not be viewed as essential prerequisites to the admissibility of such evidence." (*Brown*, *supra*, 8 Cal.4th at pp. 749—750.) Only the fact that a complaint was made and the circumstances surrounding its making are ordinarily admissible; admission of evidence concerning details of the statements to prove the truth of the matter asserted violates the hearsay rule. (*Id.* at pp. 760, 763.) However, the nature of the crime and the victim's identification of the assailant are properly included. (*People v. Burton* (1961) 55 Cal.2d 328, 351.) Fresh complaint evidence may be considered by the trier of fact to corroborate the victim's testimony, but not to prove the occurrence of the crime. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522.)

Testimony by Officer Evans, Mother, and nurse practitioner Wilson that Daughter informed them of Michael's sexual abuse,[5] and Daughter's and Cousin's testimony[6] that Daughter disclosed the abuse to Cousin in the text messages, was admissible under the fresh complaint doctrine for a nonhearsay purpose, that is, to establish the fact of, and the circumstances surrounding, Daughter's disclosures. The facts and circumstances of the disclosure were relevant; defense counsel's argument implied that Daughter's failure to disclose the alleged abuse prior to Cousin's visit was a factor showing the accusations were fabricated.

Michael argues the evidence was improperly admitted under the fresh complaint doctrine because it was not limited to the fact of disclosure, but impermissibly included details about the molestation. For the most part, he is incorrect. Officer Evans testified Daughter told him that beginning two years earlier, Michael would "grab her breasts and would digitally penetrate her vagina" on the couch; she would tell him to stop; but he would not, unless she told him to stop more than once. Mother testified that Daughter said "[h]e did molest her" by touching her inappropriately "in her vagina area." Mother stated that

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[5] Michael challenges only those portions of Wilson's testimony "which were not pertinent to her findings," i.e., that he licked and rubbed Daughter's breasts, ejaculated on a towel, and held her down with his weight.

[6] Cousin did not testify to Daughter's statements at trial, except to the extent she confirmed sending and receiving the text messages. Upon being shown the text messages, she confirmed that this was the first time Daughter told Cousin "what happened to her."

Daughter provided more information later, but Mother did not describe these additional disclosures. The level of detail in this testimony was similar to that deemed to fall within the fresh complaint doctrine in other cases. The "alleged victim's statement of the nature of the offense and the identity of the asserted offender, without details, is proper." (*People v. Burton*, *supra*, 55 Cal.2d at pp. 337, 351, italics omitted [defendant " 'made me play with his peter' "]; *People v. Butler* (1967) 249 Cal.App.2d 799, 804—805 [" 'He said the man was sucking his thing' "]; *People v. Cordray* (1963) 221 Cal.App.2d 589, 594 [" 'She said he had pulled her pants down and he had kissed her between the legs' "].)

Counsel therefore did not provide deficient representation by failing to object to the foregoing evidence. "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90; *People v. Kendrick* (2014) 226 Cal.App.4th 769, 780; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 ["Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance"].) As we discuss *post*, to the extent the foregoing included detail beyond that contemplated by the fresh complaint doctrine, any error was manifestly harmless, as was admission of the text messages and the challenged aspects of the nurse practitioner's testimony.

Michael has also failed to establish that defense counsel lacked a rational tactical purpose for her actions. "[A] reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had 'no rational tactical purpose' for an action or omission." (*People v. Mickel*, *supra*, 2 Cal.5th at p. 198; *People v.*

Woodruff (2018) 5 Cal.5th 697, 746; *People v. Mai* (2013) 57 Cal.4th 986, 1009 [we defer to counsel's reasonable tactical decisions and presume counsel's actions can be explained as a matter of sound trial strategy].) " 'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Acosta*, *supra*, 28 Cal.App.5th at p. 706.)

Counsel could rationally conclude evidence about Daughter's disclosures was helpful to the defense in at least two ways. First, the evidence showed Daughter never revealed the molestation until Cousin's visit, supporting the defense theory that Cousin fabricated the abuse and convinced Daughter to support her story. (See *Brown*, *supra*, 8 Cal.4th at p. 762 ["Of course, in many cases it will be the *defendant* who believes that the particular circumstances under which the victim reported the alleged offense . . . cast doubt upon the veracity of the victim's charge"].) Second, the defense theory was that the accusations were "a revenge plot basically gone out of control because once they start saying something, they can't really take it back." Defense counsel could hope the fact Daughter disclosed the abuse to multiple persons immediately after Cousin's report supported the theory that, once Daughter told several persons about the molestation, she was too embarrassed or fearful to take her statements back, even if they were false. Thus, counsel could have opted not to seek exclusion of the evidence or a limiting instruction for tactical reasons.

b. *Michael has failed to establish prejudice*

Michael also fails to persuade us that admission of the challenged evidence was prejudicial. To establish prejudice, "defendant bears the burden to show a reasonable probability that, but for his trial counsel's errors, the result would have been different. [Citation.] A reasonable probability is one ' "sufficient to undermine confidence in the outcome." ' [Citation.]" (*People v. Olivas* (2016) 248 Cal.App.4th 758, 770.)

Here, any error in admitting the challenged testimony was harmless. The evidence was cumulative.[7] Both Daughter and Cousin testified at trial about Michael's molestation of them, in detail, and were subject to cross-examination. Daughter recounted that Michael penetrated her vagina with his finger, and attempted penetration with his penis, licked and rubbed her breasts, rubbed her vaginal area, and occasionally masturbated and ejaculated. Cousin recounted his grabbing of her buttocks and breast. Both testified about their disclosures of the abuse. Thus, the jury did not have to rely on secondhand statements from the other witnesses, or the text messages, but heard from the victims directly.

The challenged evidence was not as extensive or significant as Michael suggests. Mother's testimony about Daughter's statements was minimal, as we have described *ante*. Evans's testimony was likewise constricted and was cumulative

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[7] Nurse Wilson's testimony was cumulative, with one insignificant exception: Wilson testified that Daughter told her Michael's body weight held her down. But this statement was inconsequential, given that force was not an element of any of the charged offenses, and Daughter did not testify the molestation occurred by force.

to Daughter's trial testimony. Cousin's sister, B., testified to only two statements: (1) Cousin told B. that Daughter "has been going through the same thing"; and (2) some time after the June 2016 incident, B. spoke to Daughter, who thanked her for "helping her out of the situation" and told B. she loved her. The first statement was double hearsay, but it was cumulative and vague, and therefore innocuous. The second statement was also hearsay, but we discern no possible prejudice to Michael arising from it. As to the text messages, the inculpatory information contained therein was elicited from the victims, and the remainder, such as Daughter's feelings about the abuse, could have been elicited directly from her even if the text messages had been excluded.

Under similar circumstances, courts have concluded any error was harmless. (See *People v. Ramirez*, *supra*, 143 Cal.App.4th at pp. 1526—1527 [erroneous admission of fresh complaint evidence without restriction was harmless: "Ana testified about the rape at trial. Thus the jury did not have to rely solely on secondhand statements she made to third parties. Rather, it had the opportunity to hear from Ana directly and to judge her credibility. The statements Ana made to [three other persons] were merely cumulative to Ana's testimony at trial"]; *People v. Manning*, *supra*, 165 Cal.App.4th at pp. 880—881 [even if trial court erred by failing to give fresh complaint limiting instruction, error was harmless because victim "testified at trial, and the jury did not have to rely on her secondhand statements to other people, but was able to hear her directly and judge her credibility. Her fresh complaint statements were consistent with and cumulative to her trial testimony"]; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 818, fn. 29 [even if statements

were admitted in error "their admission could not have been prejudicial by any standard" because they were cumulative].) As in these cases, any details provided through the hearsay testimony of other witnesses were not inherently prejudicial because they merely reflected the victims' trial testimony.

Moreover, the inculpatory evidence was strong and the defense case was weak. Both girls credibly testified to Michael's acts. His conduct with both girls was similar, awakening them while they slept and starting the molestation by giving a "massage." The fact he employed a similar approach with each victim lent credence to the girls' testimony. Michael admitted to B. that he gave Cousin a massage while Cousin was asleep; the jury was entitled to infer this was unusual and suspicious behavior. And, Daughter's physical examination revealed a healed laceration on her hymenal tissue, indicative of sexual abuse.

The defense theory, that Cousin and Daughter fabricated the accusations to get back at Michael for making Cousin wash the dishes, was not compelling. Counsel repeatedly tried to paint Cousin as a "wild child," but this characterization was unsupported by the evidence. Daughter confirmed that Cousin was "having trouble" at her mother's house, had run away from home, and had begun living with Daughter and Mother, but these circumstances in no way supported an inference that Cousin was prone to fabricating false accusations.[8] There was a dearth of

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[8] Grandmother's testimony about the teddy bear and the eyebrow pencil did not succeed in depicting Cousin as a liar either. The bear was admittedly missing, having been found behind the couch later. As to the eyebrow pencil, Cousin simply asked whether Grandmother took it after Cousin looked all over

evidence that Cousin was so enraged about being required to wash the dishes that she was impelled to make up allegations of molestation. While the evidence showed the girls were close, there was no showing that Daughter was so impressionable or cowed by Cousin that she would have agreed to cooperate in framing her father. The most significant aspect of the defense was the argument that it was unlikely repeated molestations could have occurred without waking up Brother, who was sleeping a few feet away. But, evidence the girls made repeated disclosures after Cousin's visit was unlikely to have any impact on the jury's consideration of that evidence. To the contrary, as we have discussed, the fact Daughter revealed the abuse to multiple people was consistent with the defense theory that once made, the accusations were difficult to take back. In light of the record, there is no reasonable probability that, had the challenged evidence been omitted or had a limiting instruction been given, the result would have been different.

People v. Scalzi (1981) 126 Cal.App.3d 901, cited by Michael, is distinguishable. There, the defendant was convicted of conspiring to sell methamphetamine. Police executing a search warrant found him at a friend's home with other persons, seated at a table that held methamphetamine and paraphernalia used in drug sales. Defendant contended he was only at the house to borrow money, and was uninvolved in a drug sale conspiracy. Over his objection, the trial court admitted evidence that one of the officers answered a telephone call at the residence during the

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the house but was unable to find it, and Cousin was mollified when Grandmother found a substitute. We do not believe reasonable jurors would have inferred from this testimony that Cousin was prone to fabricating allegations of molestation.

search, in which the nontestifying caller asked whether the defendant had "taken care of business" and "gotten it bagged up," street jargon for packaging narcotics for sale. (*Id.* at pp. 905—906.) Admission of the evidence was reversible error: it was inadmissible to prove the officer's state of mind; the prosecutor argued the evidence for its truth; and the remaining evidence did not render defendant's explanation for his presence implausible. (*Id.* at pp. 907—908.) But the facts of the instant matter are readily distinguishable. In *Scalzi*, the phone call was not only the most incriminating evidence, the caller's statements were the *only* evidence directly implicating the defendant in the conspiracy. Here, in contrast, the challenged evidence was merely cumulative, and the properly admitted trial testimony of the victims was far more damning than their repetition of the accusations to others.

In sum, Michael's ineffective assistance claim fails. He has likewise failed to establish a federal due process violation or cumulative error. As our discussion *ante* makes clear, he has not shown admission of the challenged evidence, whether considered singly or cumulatively, made his trial fundamentally unfair. (See *People v. Partida* (2005) 37 Cal.4th 428, 436 ["admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.